

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ELVIRA CASTILLO,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No. CV 15-07061-DFM

MEMORANDUM OPINION
AND ORDER

Plaintiff Elvira Castillo (“Plaintiff”) appeals from the final decision of the Administrative Law Judge (“ALJ”) denying her applications for Social Security disability benefits. On appeal, the Court concludes that the ALJ erred when finding that Plaintiff could perform her past relevant work as a general clerk and receptionist. The ALJ’s decision is therefore reversed and the matter is remanded for further proceedings consistent with this opinion.

I.

BACKGROUND

Plaintiff Elvira Castillo (“Castillo”) applied for supplemental security income and disability insurance benefits on October 6, 2011, alleging disability beginning on July 19, 2011. Administrative Record (“AR”) 242. The

1 Commissioner denied Castillo's applications initially and again on appeal, and
2 Castillo requested a hearing. AR 152-66. The hearing took place on February
3 4, 2014. AR 62-95. The Administrative Law Judge ("ALJ") issued his decision
4 on February 14, 2014, finding that Castillo could perform her past relevant
5 work as a receptionist and general clerk. AR 45-57. The Appeals Council
6 denied Castillo's request for review, and she filed this civil action on
7 September 7, 2015. AR 8-13, 21; Dkt. 1.

8 The parties' Joint Stipulation presents six issues:

- 9 (1) Did the ALJ err in assessing the opinions of Castillo's treating and
10 examining doctors?
11 (2) Did the ALJ properly evaluate Castillo's mental and physical
12 impairments at step two of the five-step sequential evaluation
13 process?
14 (3) Did the ALJ properly undertake the step-three analysis in assessing
15 whether Castillo's systemic lupus erythematosus ("lupus")¹ met or
16 equaled a listed impairment?
17 (4) Did the ALJ err at step four in finding that Castillo could perform
18 her past relevant work as a receptionist and general clerk?
19 (5) Did the ALJ properly discredit Castillo's testimony?
20 (6) Did the ALJ properly discredit third-party written testimony?

21 Dkt. 16 ("JS") at 4, 32-33.²

22 ///

23 ///

24
25 ¹ Lupus is a chronic, multisystem, inflammatory disorder of autoimmune
26 etiology. Robert S. Porter, M.D., et al., eds., The Merck Manual of Diagnosis
27 and Therapy 305 (Merck Research Labs., 19th ed. 2011) ("Merck Manual").

28 ² Citations to the Joint Stipulation refer to the CM/ECF pagination.

II.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The ALJ's findings and decision should be upheld if they are free from legal error and are supported by substantial evidence based on the record as a whole. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less than a preponderance. Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports a finding, the reviewing court "must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998) (citations omitted). "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Id. at 720-21 (citing Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)). "A decision of the ALJ will not be reversed for errors that are harmless." Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

III.

THE EVALUATION OF DISABILITY

A. Five-Step Sequential Process

A person is "disabled" for purposes of receiving Social Security benefits if he is unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted, or

1 is expected to last, for a continuous period of at least 12 months. 42 U.S.C. §
 2 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). A
 3 claimant for disability benefits bears the burden of producing evidence to
 4 demonstrate that he was disabled within the relevant time period. Johnson v.
 5 Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995).

6 The ALJ follows a five-step sequential evaluation process in assessing
 7 whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); Lester v.
 8 Chater, 81 F.3d 821, 828 n. 5 (9th Cir. 1996). In the first step, the
 9 Commissioner must determine whether the claimant is currently engaged in
 10 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
 11 the claimant is not, then the second step requires the Commissioner to
 12 determine whether the claimant has a “severe” impairment or combination of
 13 impairments significantly limiting his or her ability to do basic work activities.
 14 Id. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does, then the third
 15 step requires the Commissioner to determine whether the impairment or
 16 combination of impairments meets or equals an impairment in the Listing of
 17 Impairments (“Listing”) set forth at 20 C.F.R., Part 404, Subpart P, Appendix
 18 1. Id. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment(s) do not, then
 19 the fourth step requires the claimant to prove that he or she does not have the
 20 sufficient residual functional capacity (“RFC”) to perform his or her past work.
 21 Id. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv); Drouin, 966 F.2d at 1257. If the
 22 claimant meets this burden or has no past relevant work, the Commissioner
 23 then bears the burden of establishing that the claimant is not disabled because
 24 she can perform other substantial gainful work available in the national
 25 economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

26 **B. The ALJ’s Application of the Five-Step Process**

27 At step one, the ALJ determined that Castillo had not engaged in
 28 substantial gainful activity since the alleged onset date. AR 47. At step two, the

1 ALJ determined that Castillo had the severe impairments of lupus,
2 hypothyroidism, hepatitis C, and gastroesophageal reflux disease. AR 49. At
3 step three, the ALJ found that Castillo's medically determinable impairments
4 did not, either singly or in combination, meet the criteria of any Listing. AR
5 50. The ALJ determined that Castillo had the RFC to perform sedentary work,
6 avoiding concentrated exposure to extreme heat and hazards. AR 50-55. The
7 ALJ found at step four that Castillo could perform her past relevant work as a
8 receptionist and general clerk. AR 55-56.

9 IV.

10 DISCUSSION

11 A. Issue One: Examining and Treating Doctors

12 Castillo argues that the ALJ improperly rejected the opinions of three
13 treating or examining physicians. JS at 4-20, 25-27.

14 1. Relevant Facts

15 a. Dr. Krispinsky

16 Castillo saw Dr. Megan Krispinsky as her primary care physician
17 between August 2011 and January 2014. See AR 80, 443, 658. On August 1,
18 2013, Dr. Krispinsky noted:

19 Patient has not been to work in 2 weeks . . . She states that she
20 feels pain all over, but that the most pain is felt in her hands and
21 left shoulder . . . She states that her mental status is fine and that
22 she does not feel depressed. She reports having a very good
23 outlook on life. In more recent visits with the patient she was very
24 depressed and her antidepressant had to be increased. She was
25 given names of places to go for counseling but the patient states
26 she did not want to go and that she does not think she has to go.
27 The patient feels she cannot work in this state. She is applying for
28 full disability. I stress to the patient that with pain control, which

1 could be achieved with starting Lyrica and counseling, that she
 2 could work and perform all daily living activities. She states it is
 3 not possible.

4 AR 708.

5 In December 2013, Dr. Krispinsky concluded that Castillo could sit for
 6 one hour, stand for 30 minutes, sit for four hours and stand or walk for two
 7 hours in an eight-hour workday, lift less than ten pounds frequently, ten to
 8 twenty pounds occasionally, and 50 pounds never. AR 486. Dr. Krispinsky
 9 stated that Castillo had significant limitations in repetitive reaching, handling,
 10 or fingering. Id. Dr. Krispinsky concluded that Castillo would need to walk for
 11 five minutes every hour, and would need to take unscheduled ten-minute
 12 breaks every 1-2 days. AR 485-86. Dr. Krispinsky also concluded that Castillo
 13 would need to be absent from work twice a month due to her impairments or
 14 treatment. AR 487. Dr. Krispinsky stated that Castillo could bend and twist at
 15 the waist for 80 percent of an eight-hour workday. Id.

16 b. Dr. Greger

17 Dr. Stephanie Greger replaced Castillo's rheumatologist when that
 18 doctor left the practice. AR 80. Dr. Greger saw Castillo once in November
 19 2013 and once in January 2014. See AR 636-40. On January 21, 2014, Dr.
 20 Greger diagnosed Castillo with lupus, Sjögren's syndrome, myositis, and
 21 fibromyalgia.³ AR 615. Dr. Greger concluded that Castillo could sit for 30
 22 minutes, stand for 15 minutes, sit for four hours and stand or walk for two

23 ³ Sjögren's syndrome is a "relatively common chronic, autoimmune,
 24 systemic, inflammatory disorder of unknown cause. It is characterized by
 25 dryness of the mouth, eyes, and mucus membranes." Merck Manual at 303.
 26 Myositis is an "uncommon systemic rheumatic disorder[]." Id. at 299.
 27 Fibromyalgia is a "common nonarticular disorder of unknown cause
 28 characterized by generalized aching . . . widespread tenderness of muscles . . .
 fatigue . . . and poor sleep." Id. at 375.

1 hours in an eight-hour workday, and needed unscheduled breaks of fifteen to
2 twenty minutes four or more times a day in an eight-hour workday. AR 618.
3 Dr. Greger also opined that Castillo could lift and carry ten pounds or less only
4 occasionally, use her hands for grasping, turning, twisting, and fine
5 manipulation for 25 percent of an eight-hour workday, reach for 20 percent of
6 an 8-hour workday, and bend 15 percent and twist 10 percent of an 8-hour
7 workday. AR 619. For every possible environmental restriction, Dr. Greger
8 checked “avoid even moderate exposure.” Id. Dr. Greger claimed that Castillo
9 would need to be absent from work as a result of her impairments more than 3
10 times a month—the maximum option available. AR 620.

11 c. Dr. Wendel

12 Dr. Isadore Wendel is the state agency psychological consultative
13 examiner who performed a mental examination of Castillo and prepared a
14 report dated November 2, 2012. AR 475-78. Dr. Wendel noted that Castillo
15 denied a history of mental health treatment. AR 476. Dr. Wendel recorded
16 that Castillo was oriented to basic personal information, could name the U.S.
17 President, and could name the prior two U.S. Presidents when prompted with
18 first names. Id. at 477. He noted that her memory was adequate, she was alert,
19 and she adequately sustained concentration during the interview. Id. Her
20 thought process showed no aberrations, although she had difficulty giving
21 high-level answers to abstract verbal reasoning questions. Id. Her insight and
22 judgment were “apparently good.” Id.

23 Dr. Wendel diagnosed Castillo with major depression in partial
24 remission with medication. Id. Dr. Wendel also concluded, based on
25 “apparently credible report,” that Castillo’s activity was “considerably limited
26 due to pain.” AR 478. Castillo had “a marked [reduction] in the activities of
27 daily living, due to the physical effects of her illness, by apparently credible
28 self-report.” Id. Castillo had “moderate impairment” in “concentration,

1 persistence, and pace, due to interference with pain and dizziness,” and would
 2 likely “evidence repeated episodes of emotional deterioration in work-like
 3 situations due to pain and dizziness.” Id.

4 d. State Consultants

5 Two state agency doctors reviewed Castillo’s medical records. On April
 6 6, 2012, L. Bobba, M.D., concluded that Castillo had the severe impairment of
 7 lupus. AR 102. He found that Castillo’s statements about her symptoms were
 8 not substantiated by the objective medical evidence, and that she was partially
 9 credible in that her lupus symptoms were controlled by medication. AR 102-
 10 03. He concluded that she had no manipulative limitations and her only
 11 environmental limitation was extreme heat and hazards. AR 103-04. On
 12 November 30, 2012, after reviewing Castillo’s medical records and Dr.
 13 Wendel’s report, F. Wilson, M.D., reached the same conclusions as Dr. Bobba
 14 and noted that records showed her lupus was controlled. AR 131-33. Dr.
 15 Wilson concluded that Dr. Wendel’s opinion relied heavily on Castillo’s
 16 subjective reports and contained inconsistencies. AR 133.

17 A third state agency doctor reviewed Castillo’s medical records and Dr.
 18 Wendel’s report. On December 6, 2012, Kim Morris, Psy. D., noted that Dr.
 19 Wendel had opined on both of Castillo’s physical and psychological
 20 impairments. AR 142-43. Dr. Morris observed that because Dr. Wendel was a
 21 psychologist, her conclusions regarding Castillo’s physical symptoms should
 22 be given no weight. Dr. Morris concluded that Castillo’s depression was in
 23 partial remission with medication and that her depression was not severe. Id.

24 **2. Analysis**

25 Three types of physicians may offer opinions in Social Security cases:
 26 those who directly treated the plaintiff, those who examined but did not treat
 27 the plaintiff, and those who did not treat or examine the plaintiff. See 20
 28 C.F.R. §§ 404.1527(c), 416.927(c); Lester, 81 F.3d at 830. A treating

1 physician's opinion is generally entitled to more weight than that of an
2 examining physician, which is generally entitled to more weight than that of a
3 non-examining physician. Lester, 81 F.3d at 830. The ALJ must give specific
4 and legitimate reasons for rejecting a treating physician's opinion in favor of a
5 non-treating physician's contradictory opinion, or an examining physician's
6 opinion in favor of a non-examining physician's opinion. Orn v. Astrue, 495
7 F.3d 625, 632 (9th Cir. 2007); Lester, 81 F.3d at 830-31. If the treating
8 physician's opinion is uncontroverted, it may be rejected only for "clear and
9 convincing" reasons. Lester, 81 F.3d at 830. However, "[t]he ALJ need not
10 accept the opinion of any physician, including a treating physician, if that
11 opinion is brief, conclusory, and inadequately supported by clinical findings."
12 Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); accord Tonapetyan v.
13 Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). The factors to be considered by
14 the adjudicator in determining the weight to give a medical opinion include the
15 "[l]ength of the treatment relationship and the frequency of examination" by
16 the treating physician and the "nature and extent of the treatment relationship"
17 between the patient and the treating physician. Orn, 495 F.3d at 631; see also
18 20 C.F.R. §§ 404.1527(c)(2)(i)-(ii), 416.927(c)(2)(i)-(ii).

19 a. Dr. Krispinsky

20 In concluding that Castillo had the RFC to perform sedentary work, the
21 ALJ gave great weight to the state agency physical medical consultants who
22 never treated or examined her. AR 50, 54. The ALJ considered, but did not
23 give great weight to Dr. Krispinsky's opinion, reasoning as follows:

24 The undersigned finds [Dr. Krispinsky's] opinion is not entirely
25 reasonable given the objective medical evidence and claimant's
26 testimony. The claimant's diagnosis of lupus suggests that she may
27 experience fatigue and should be limited to a lower level of
28 exertional work to avoid exacerbation of this condition.

1 Additionally, although the claimant reported hand pain, the
2 medical records show minimal treatment related to this condition.
3 In fact, Dr. Krispinsky stressed that the claimant should try to get
4 her pain under control and attend counseling to help her be able to
5 return to work . . . This suggests that Dr. Krispinsky does not
6 entirely agree with the claimant's alleged limitations.

7 AR 54-55.

8 The ALJ articulated specific and legitimate reasons for not giving great
9 weight to Dr. Krispinsky's opinion. As discussed above, Dr. Krispinsky's notes
10 from August 2013 showed that with appropriate treatment, Castillo could
11 work and perform all daily living activities. See AR 708. Castillo claims that
12 Dr. Krispinsky's notes undermine only Castillo's complaints, not Dr.
13 Krispinsky's conclusions in December 2013. JS at 8. The Court disagrees. Dr.
14 Krispinsky's notes reflect that Dr. Krispinsky believed that with proper pain
15 medication and counseling, Castillo could return to work and perform "all
16 daily living activities." In effect, Dr. Krispinsky concluded that Castillo's pain
17 was not disabling. See Warre v. Comm'r, 439 F.3d 1001, 1006 (9th Cir. 2006)
18 ("Impairments that can be controlled effectively with medication are not
19 disabling for the purpose of determining eligibility for SSI benefits."). The
20 record supports the ALJ's finding that Dr. Krispinsky did not agree with
21 Castillo's alleged limitations—or rather, believed that these alleged limitations
22 could be controlled with proper treatment.

23 Castillo next argues that "the medical records do, in fact, show that
24 [Castillo was] treated for pain, swelling, and weakness in her hands." JS at 8,
25 10. The ALJ never stated that Castillo did not receive treatment for her upper
26 extremity pain. Rather, the ALJ wrote that "the medical records show minimal
27 treatment related to" Castillo's hand pain, AR 54, which the ALJ noted at the
28 hearing primarily affected her left, non-dominant side, AR 92. Castillo

1 reported left hand, wrist, and shoulder pain at various points in 2012 and 2013,
2 and that she would take Norco when the pain became bad and also engaged in
3 physical therapy. See, e.g., AR 562, 569, 572, 575, 584, 689, 701, 708. Her
4 medical records reflect significant improvement in that pain with minimal
5 treatment. In January 2012, she no longer had left shoulder pain. AR 432. In
6 April 2012, she had only intermittent left shoulder pain. AR 424. In August
7 2012, her left upper extremity pain had improved with physical therapy, and
8 she had gained strength; physical examinations showed no pain to palpitation
9 and intact sensation. AR 582. In December 2012, Castillo was doing “very
10 well” and “completely pain free,” even asking to discontinue medication due
11 to her improvement. AR 576. In April 2013, Castillo had started working at a
12 bakery—a job that was far more taxing than a sedentary position—where she
13 would push carts weighing more than 50 pounds, remove racks, and put
14 products on the tables and package, label, and put them on the floor. AR 68.
15 That same month, her initial pain during her shifts had decreased; a month
16 later, she was experiencing no pain. AR 570-71. In August 2013, Castillo
17 reported a sudden increase in hand and left shoulder pain that prevented her
18 from continuing to work at the bakery and stated to Dr. Krispinsky that she
19 was applying for full disability. AR 708. Importantly, at this time, Dr.
20 Krispinsky wrote: “I stress to the patient that with pain control, which could be
21 achieved with starting Lyrica and counseling, that she could work and perform
22 all daily living activities. She states it is not possible.” *Id.* (emphasis added).
23 These records reflect minimal treatment for Castillo’s hand and upper
24 extremity pain, and also specific and legitimate reasons for giving less weight
25 to Dr. Krispinsky’s conclusion that Castillo had “significant limitations” in
26 repetitive reaching, handling, or fingering.

27 Third, Castillo argues that her testimony was not inconsistent with Dr.
28 Krispinsky’s opinion. JS at 8-10. Again, the Court disagrees. Castillo at times

1 testified that her symptoms were more severe than the limitations offered by
2 Dr. Krispinsky. For example, Castillo claimed she could lift no more than ten
3 pounds; Dr. Krispinsky concluded she could lift 20 pounds occasionally. AR
4 81, 486. Castillo claimed that she could not sit for longer than 20 or 30 minutes
5 or stand for longer than 10 or 15 minutes; Dr. Krispinsky opined that she was
6 limited to one hour and 30 minutes, respectively. AR 79, 486.

7 Last, Castillo argues that the state agency physicians' opinions were not
8 substantial evidence to support rejecting the treating physicians' opinions. JS at
9 10-11. Castillo does not give any support for the contention that Dr. Bobba's,
10 Dr. Wilson's, and Dr. Morris's review of the record as of the end of 2012—
11 combined with the ALJ's review of the entire record and assessment of the
12 treating and examining physicians' opinions and Castillo's credibility—could
13 not support the ALJ's conclusions, as this Court finds they do.

14 b. Dr. Greger

15 The ALJ gave little weight to Dr. Greger's opinion, which he described
16 as "brief, conclusory, and inadequately supported by clinical findings,"
17 reasoning as follows:

18 Dr. Greger . . . did not provide medically acceptable clinical or
19 diagnostic findings to support the overly restrictive functional
20 assessment. This opinion is inconsistent with the objective medical
21 evidence as a whole, which shows good improvement with
22 conservative treatment of medications, mild physical findings, and
23 unremarkable diagnostic findings. Moreover, Dr. Greger noted
24 that she had only seen the claimant since November 2013 and saw
25 her twice per month, which indicates that she saw her a total of
26 two times prior to giving an opinion. Therefore, although Dr.
27 Greger does have a treating relationship with the claimant, the
28 record reveals that actual treatment has been over a relatively brief

1 period. As a result, the treating relationship did not last long
2 enough for Dr. Greger to have obtained a longitudinal picture of
3 the claimant's medical condition.

4 AR 55.

5 Castillo first contends that the ALJ's reasons for rejecting Dr. Greger's
6 opinion fail for the same reasons that his rejection of Dr. Krispinsky's opinion
7 fails. JS at 14. As explained above, the ALJ's reasons with respect to Dr.
8 Krispinsky's opinion were valid.

9 Castillo next argues that the ALJ should have found that she had the
10 severe impairment of fibromyalgia, citing Dr. Greger's diagnosis. JS at 14-16.
11 The ALJ did not specifically discuss Dr. Greger's fibromyalgia diagnosis in his
12 decision. However, the ALJ otherwise gave specific and legitimate reasons for
13 rejecting Dr. Greger's findings. See Howard v. Barnhart, 341 F.3d 1006, 1012
14 (9th Cir. 2003) (noting that ALJ does not need to discuss every piece of
15 evidence in the record as long as the decision is supported by substantial
16 evidence). Furthermore, a mere diagnosis does not establish a severe
17 impairment. Febach v. Colvin, 580 F. App'x 530, 531 (9th Cir. 2014).

18 Castillo also argues that the ALJ erred because Dr. Greger "took over"
19 as treating rheumatologist from her prior doctors and had "full access" to her
20 "extensive treatment history." JS at 17. Castillo cites no authority to support
21 her argument that past visits with other physicians in the same practice should
22 be attributed to a treating physician as evidence of a significant longitudinal
23 relationship. Castillo points out that in Ghokassian v. Shalala, 41 F.3d 1300,
24 1303 (9th Cir. 1994), two visits in a 14-month period was enough to establish a
25 treating physician's relationship. JS at 27. Ghokassian is inapposite. In that
26 case, the ALJ's only reasons for discounting the doctor's opinion were that the
27 doctor saw the patient for the first time a year before the hearing and he did
28 not identify the interpreter who accompanied the patient. Ghokassian, 41 F.3d

1 at 1303-04. Here, the ALJ acknowledged that Dr. Greger was a treating
2 physician and gave several legitimate reasons for discounting her opinions. AR
3 55. The ALJ permissibly accorded less weight to Dr. Greger's opinion based
4 on the brevity of that relationship. 20 C.F.R. § 404.1527(c)(2)(i) ("Generally,
5 the longer a treating source has treated you and the more times you have been
6 seen by a treating source, the more weight we will give to the source's medical
7 opinion."); 20 C.F.R. § 416.927(c)(2)(i) (same).

8 Last, Castillo argues that the ALJ erred in characterizing Castillo's
9 response to her medical care as "good improvement with conservative
10 treatment of medications." JS at 16-17. As laid out in Section IV.A.2, supra,
11 substantial evidence supported the ALJ's conclusions that with medication,
12 Castillo's lupus could be controlled. Castillo points out that the medical
13 records show that she visited the hospital three times between July 2011 and
14 January 2012, and made several trips to the emergency room between July
15 2011 and January 2014. See JS at 16 (record citations).⁴ Even if the ALJ
16 somehow erred in describing Castillo's treatment as "conservative," an ALJ's
17 errors in evaluating the opinion of an examining physician are harmless if the
18 ALJ nonetheless gave other specific and legitimate reasons supported by
19 substantial evidence for rejecting the opinion. See DeBerry v. Comm'r of Soc.
20 Sec. Admin., 352 Fed. Appx. 173, 176 (9th Cir. 2009).

21
22 ⁴ Castillo claims that she made 15 trips to the emergency room over 3
23 years. JS at 16. Some of these emergency room trips appear not to have been
24 emergencies or were grouped together. For example, on November 30, 2011,
25 the ER physician wrote: "She had several visits in the last few days with
26 bilateral knee pain and swelling. I saw her knee two nights ago. Her exam was
27 unremarkable at that time. She was sent to see Dr. Pearson who agreed and
28 ordered x-rays. The x-rays were unremarkable. Dr. Pearson graciously came
down and talked to the patient here in the emergency room, and after a long
discussion with Dr. Pearson, she felt better about her pain." AR 411.

1 c. Dr. Wendel

2 The ALJ found that Castillo's depression did not cause more than
3 minimal limitations in her ability to perform basic mental work activities. AR
4 48. The ALJ gave little weight to Dr. Wendel's opinion, reasoning:

5 [Dr. Wendel's] opinion is grossly inconsistent with [her] clinical
6 findings, which show no more than mild limitations in
7 concentration, persistence, and pace. Moreover, Dr. Wendel
8 appeared to base [her] opinion largely on the claimant's physical
9 complaints. However, Dr. Wendel is a psychologist, not a medical
10 doctor. Therefore, the claimant's allegations related to [the
11 claimant's] physical impairments are outside the area of Dr.
12 Wendel's specialty and should not have been the sole basis for her
13 opinion. Further, this opinion is inconsistent with the objective
14 medical evidence, as well as the claimant's own testimony, which
15 shows mild depression that was resolved with conservative
16 treatment of an anti-depressant. The claimant's lack of treatment
17 further indicates that this condition causes no more than minimal
18 limitations.

19 AR 49. The ALJ gave great weight to the opinions of the state agency
20 psychological consultative examiners. Id. The ALJ found the state consultants'
21 opinions to be consistent with the objective medical evidence, which showed
22 unremarkable mental status examinations, significant improvement with
23 conservative treatment of medication, lack of counseling, and Castillo's
24 admission that her symptoms were mild. Id.

25 The ALJ articulated specific and legitimate reasons for giving little
26 weight to Dr. Wendel's opinion. Dr. Wendel's conclusions and clinical
27 findings were contradictory because Castillo registered three out of three words
28 immediately, three out of three words after several minutes, could perform

1 serial threes, was able to solve a simple financial problem, had coherent
2 thought processes, and could understand what was said to her and make
3 herself understood. AR 477. Given these clinical findings, the fact that Castillo
4 did not perform the test perfectly is not enough to support Dr. Wendel's
5 opinion.

6 Castillo argues that the ALJ should not have rejected Dr. Wendel's
7 opinions regarding her "marked" restrictions in daily living because Dr.
8 Wendel found Castillo's reports to be credible and medical records supported
9 these reports. JS at 19. As noted above, the medical records do not entirely
10 support Castillo's reports, and the fact that Dr. Wendel found Castillo's reports
11 to be "credible" does not mean that the ALJ cannot discount Dr. Wendel's
12 opinion for relying solely on Castillo's reports. See Ukolov v. Barnhart, 420
13 F.3d 1002, 1005-06 (9th Cir. 2005) (holding that a treating physician's
14 restatement of a patient's subjective complaints did not support a finding of
15 impairment because they were based solely on the patient's own perception or
16 description of his problems).

17 Castillo also argues that the fact that Dr. Wendel was not a medical
18 doctor is not legitimate reason to reject her opinions. JS at 19-20. This may be
19 true with respect to a psychologist's opinions regarding mental impairments,
20 but it is not the case with respect to a psychologist's opinions regarding
21 physical impairments. See Bollinger v. Barnhart, 178 F. App'x 745, 746 n.1
22 (9th Cir. 2006) (holding that ALJ properly discounted psychologist's opinion
23 regarding physical limitations because it was beyond psychologist's expertise).
24 Dr. Wendel went beyond merely assessing the impact of Castillo's physical
25 symptoms on her mental condition to opining on her physical symptoms
26 themselves. See AR 478. The ALJ properly ignored these aspects of Dr.
27 Wendel's opinion.

28 Last, Castillo argues that she did not testify that her depression was

1 “resolved” and that nothing in her testimony undermined Dr. Wendel’s
2 opinion. JS at 20. The ALJ never stated that Castillo’s depression was
3 “resolved.” He stated that her depression was resolved with “conservative
4 treatment of an anti-depressant.” AR 49. Castillo so testified, stating that her
5 depression was substantially, if not entirely, alleviated by a low dose of anti-
6 depressants. See AR 75-76. This is a further specific and legitimate reason for
7 giving little weight to Dr. Wendel’s opinion.

8 **B. Issue Two: Mental and Physical Impairments**

9 Castillo argues that the ALJ improperly assessed her mental and physical
10 impairments at step two, undermining the RFC finding. JS at 27-31.

11 “In step two of the disability determination, an ALJ must determine
12 whether the claimant has a medically severe impairment or combination of
13 impairments.” Keyser v. Comm’r Soc. Sec. Admin., 648 F.3d 721, 725 (9th
14 Cir. 2011). The existence of a severe impairment is demonstrated when the
15 evidence establishes that an impairment has more than a minimal effect on an
16 individual’s ability to perform basic work activities. Webb v. Barnhart, 433
17 F.3d 683, 686-87 (9th Cir. 2005); Smolen, 80 F.3d at 1290; 20 C.F.R. §§
18 404.1521(a), 416.921(a). The regulations define “basic work activities” as “the
19 abilities and aptitudes necessary to do most jobs,” which include physical
20 functions such as walking, standing, sitting, pushing, and carrying, and mental
21 functions such as understanding and remembering simple instructions;
22 responding appropriately in a work setting; and dealing with changes in a work
23 setting. 20 C.F.R. §§ 404.1521(b), 416.921(b). The inquiry at this stage is “a de
24 minimis screening device to dispose of groundless claims.” Smolen, 80 F.3d at
25 1290 (citing Bowen v. Yuckert, 482 U.S. 137, 153-54 (1987)). An impairment
26 is not severe if it is only a slight abnormality with “no more than a minimal
27 effect on an individual’s ability to work.” SSR 85-28, 1985 WL 56856, at *3
28 (1985); Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988). A “finding of no

1 disability at step two” may be affirmed where there is a “total absence of
2 objective evidence of severe medical impairment.” Webb, 433 F.3d at 688
3 (reversing a step two determination “because there was not substantial
4 evidence to show that [the claimant’s] claim was ‘groundless’”).

5 Castillo first argues that the ALJ erred in finding that Castillo had no
6 severe mental impairment because Dr. Wendel’s opinion and Castillo’s
7 treatment records document her depression and anxiety. JS at 29-30.

8 In evaluating the severity of a claimant’s mental impairments, the ALJ is
9 bound by 20 C.F.R. § 404.1520a, which requires a special psychiatric review
10 technique. Keyser, 648 F.3d at 725. Specifically, the ALJ must determine
11 whether an applicant has a medically determinable mental impairment, rate
12 the degree of functional limitation for four functional areas, determine the
13 severity of the mental impairment, and then, if the impairment is severe,
14 proceed to step three of the disability analysis. 20 C.F.R. §§ 404.1520a,
15 416.920a; Keyser, 648 F.3d at 725. The applicable regulations specify four
16 functional areas: activities of daily living; social functioning; concentration,
17 persistence, or pace; and episodes of decompensation. 20 C.F.R. §§
18 404.1520a(c)(3), 416.920a(c)(3). The first three functional areas are rated using
19 a five-point scale: none, mild, moderate, marked, and extreme. 20 C.F.R. §§
20 404.1520a(c)(4), 416.920a(c)(4). The fourth functional area is rated using a
21 four-point scale: none, one or two, three, and four or more. Id. A mental
22 impairment is generally considered not severe if the degree of limitation in the
23 first three functional areas is rated as “none” or “mild” and there have been no
24 episodes of decompensation. 20 C.F.R. §§ 404.1520a(d)(1), 416.920a(d)(1).

25 The ALJ did not commit error here. The ALJ properly gave little weight
26 to Dr. Wendel’s opinion, as explained in Section IV.A.2.c, supra. The ALJ
27 found that Castillo’s mental impairments caused mild limitations in her daily
28 living activities, social functioning, and ability to maintain concentration,

1 persistence, and pace, and she had experienced no episodes of
2 decompensation. AR 48. Castillo points to nothing specific in her medical
3 records to combat these findings (other than citing to pages in the record
4 mentioning Castillo's complaints of depression and anxiety), and the ALJ cited
5 evidence in support of his findings. Taking Celexa improved Castillo's
6 symptoms. AR 48, 595. In October 2012, Castillo requested a referral to a
7 mental health professional, but as of April 2013, had not scheduled an
8 appointment. AR 48, 571, 580. In August 2013, Castillo stated that her
9 "mental status is fine and that she does not feel depressed. She reports having a
10 very good outlook on life." AR 48-49, 708. At the hearing, Castillo stated that
11 the low dose of anti-depressant that she had been prescribed was helpful, and
12 that she had only seen a counselor twice. AR 49, 75-76. State physician Dr.
13 Morris reviewed the evidence and was consistent with the ALJ's finding. AR
14 49, 142.

15 Castillo also argues that the ALJ failed to properly assess Castillo's
16 fibromyalgia and migraine headaches. JS at 30. The Court addressed the
17 fibromyalgia issue in Section IV.A.2.b, supra. As for Castillo's migraines,
18 Castillo's primary care physician did not diagnose her with migraines. See AR
19 483. Furthermore, the objective medical evidence does not suggest that her
20 migraines more than minimally limited her ability to perform sedentary work,
21 and Castillo does not cite to anything in the record to the contrary.

22 Last, Castillo argues that the ALJ should have included manipulative
23 limitations in his findings. JS at 30-31. The Court addressed this argument
24 above in Section IV.A.2.a, supra. Accordingly, remand is not warranted on
25 Plaintiff's claim of error.

26 **C. Issue Three: Castillo's Lupus As a Listed Impairment**

27 Castillo argues that the ALJ erroneously found that Castillo did not meet
28 or medically equal the criteria of a listed impairment of lupus at step three and

1 did not properly consider Dr. Greger's, Dr. Krispinsky's, or Dr. Wendel's
2 opinions. JS at 39-41. Castillo also argues that ALJ should have obtained
3 medical opinion evidence from a medical expert. JS at 40-41.

4 These arguments depend entirely on Castillo's argument in Issue One,
5 which fails for the reasons set forth in Section IV.A.2.a-c, supra. The ALJ
6 properly discounted the opinions of Drs. Greger, Krispinsky, and Wendel.
7 Therefore, the ALJ was not required to obtain medical opinion evidence from
8 a medical expert. See Social Security Ruling ("SSR") 96-6p, 1996 WL 374180,
9 *3-4 (July 2, 1996) (stating that an ALJ should obtain medical opinion
10 evidence when additional medical evidence "in the opinion of" the ALJ may
11 change the state agency medical or psychological consultant's finding that the
12 impairment is not equal in severity to a listed impairment). Castillo does not
13 explain how she would meet the criteria of the lupus listed impairment without
14 great weight being given to the opinions of Drs. Greger, Krispinsky, and
15 Wendel, and the burden was on her to make this showing. Bowen v. Yuckert,
16 482 U.S. 137, 141, 146 n.5 (1987).

17 Castillo also argues that the ALJ's "boilerplate" conclusion is prohibited
18 by Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990), in which the Ninth
19 Circuit found that the ALJ had not adequately explained his step-three
20 conclusion. JS at 39. The Ninth Circuit has recognized, however, that an ALJ
21 need not recite the reasons for a step-three determination so long as the
22 supporting evidence is discussed in the ALJ's decision—which it was here. See
23 Lewis v. Apfel, 236 F.3d 503, 513 (9th Cir. 2001); AR 50-55. Plaintiff is not
24 entitled to relief on this claim of error.

25 **D. Issue Four: Past Relevant Work**

26 Castillo argues that the ALJ erred at step four in concluding that Castillo
27 could perform her past relevant work as a receptionist and general clerk. JS at
28 31-33, 36-38.

1 At step four, the claimant has the burden to prove that she cannot
2 perform her past relevant work either as actually performed or as generally
3 performed in the national economy. Carmickle v. Comm'r, 533 F.3d 1155,
4 1166 (9th Cir. 2008). Although the burden lies with the claimant, the ALJ
5 must make the requisite factual findings to support a conclusion that the
6 claimant is capable of performing her past work. Pinto v. Massanari, 249 F.3d
7 840, 844 (9th Cir. 2001). The ALJ does so by looking at the claimant's RFC
8 and the physical and mental demands of the claimant's past relevant work. Id.
9 at 844-45 (citing 20 C.F.R. §§ 404.1520(e), 416.920(e)). The ALJ must make
10 "specific findings as to the claimant's residual functional capacity, the physical
11 and mental demands of the past relevant work, and the relation of the residual
12 functional capacity to the past work." Id. at 845 (citing SSR 82-62). Social
13 Security Regulations name two sources of information that may be used to
14 define a claimant's past relevant work as actually performed: a properly
15 completed work history report and the claimant's own testimony. Id. (citing
16 SSR 82-61, 82-41). The Dictionary of Occupational Titles ("DOT") is the best
17 source for how a job is generally performed. Id. at 845-46 (citations omitted).

18 Here, the ALJ found that Castillo was capable of performing her past
19 relevant work of "receptionist," DOT 237.367-038, as actually and generally
20 performed. AR 55-56. Castillo argues that because she only worked as a
21 receptionist from May to June 2011, she did not "learn" the job as required by
22 20 C.F.R. §§ 404.1560(b)(1) and 416.960(b)(1) and therefore this work is not
23 past relevant work. JS at 32. The Commissioner disputes this, arguing that
24 Castillo testified at the hearing that she worked as a receptionist for six
25 months. JS at 36 (citing AR 86-87). Castillo responds that the Commissioner is
26 confusing Castillo's testimony about her work as a receptionist for one month
27 in 2011 with her work as a secretary for six months in 2009 and 2010. JS at 37-
28 38.

1 According to her work history report, Castillo worked as a “secretary”
2 from December 2009 until May 2010 and a “receptionist” from May to June
3 2011. AR 263. In the former position, she walked for 2 hours, stood for 1 hour,
4 sat for 2.5 hours, stooped for 1 hour, knelt for 30 minutes, crouched for 30
5 minutes, and wrote, typed, or handled small objects for 2.5 hours a day. AR
6 265. The heaviest weight she lifted was less than 10 pounds. Id. In the latter
7 position, she walked for 1 hour, stood for 30 minutes, sat for 5.5 hours,
8 stooped for 30 minutes, knelt for 30 minutes, and wrote, typed, or handled
9 small objects for 5.5 hours a day. AR 264. The heaviest weight she lifted was
10 less than 10 pounds. Id.

11 Although Castillo told the ALJ that she worked as a “receptionist” for
12 six months (AR 86), her work history report shows that she worked as a
13 secretary for six months and a receptionist for less than two months. AR 263.
14 The mistake in terminology is understandable for a layperson like Castillo,
15 given the similarities between the two jobs. The ALJ had a duty to clarify this
16 contradiction. See Pinto, 249 F.3d at 844-45. If Castillo worked as a
17 receptionist for only one or two months, then this past work would not be
18 “past relevant work.” The regulations define “past relevant work” as work
19 done within the past 15 years that was substantial gainful activity and lasted
20 long enough for a claimant to learn to do it. 20 C.F.R. §§ 404.1560(b)(1),
21 416.960(b)(1). The Vocational Expert (“VE”) testified that work as a
22 receptionist is semi-skilled with a Specific Vocational Preparation (“SVP”) of
23 4, requiring between 3 and 6 months to learn. AR 86; DOT, Appendix C (4th
24 ed. 1991). Thus, Castillo’s job as a receptionist would not meet the definition
25 of past relevant work.

26 The ALJ also found that Castillo was capable of performing her past
27 relevant work of “general clerk,” DOT 209.562-010, as actually performed. AR
28

1 56.⁵ Castillo argues that, given her testimony about how she performed this
2 past relevant work, her RFC limiting her to sedentary work would not enable
3 her to do the work as performed. JS at 32-33, 37.

4 Sedentary work involves standing and walking “occasionally”—meaning
5 that “periods of standing or walking should generally total no more than about
6 2 hours of an 8-hour workday, and sitting should generally total approximately
7 6 hours of an 8-hour workday.” SSR 83-10, 1983 WL 31251, *5 (Jan. 1, 1983).
8 Light work, on the other hand, requires a “good deal” of walking and
9 standing—“off and on, for a total of approximately 6 hours of an 8-hour work
10 day.” *Id.* at *5-6. For her 2010 secretarial or “general clerk” job, Castillo wrote
11 in her work history report that she walked for 2 hours, stood for 1 hour, sat for
12 2.5 hours, stooped for 1 hour, and crouched for 30 minutes. AR 265. Thus, the
13 2010 position Castillo described fell between sedentary and light work.
14 Notwithstanding this testimony, the VE opined without explanation that as
15 performed, Castillo’s work as a secretary was sedentary. AR 91.

16 The law permits VEs to assist ALJs where an individual’s RFC is “in the
17 middle” of exertional ranges of work. *See Moore v. Apfel*, 216 F.3d 864, 870
18 (9th Cir. 2000). Here, Castillo’s RFC was not in the middle of exertional
19 ranges, but simply “sedentary.” The Commissioner has not cited, and this
20 Court has not found, any authority suggesting that an ALJ may rely on a VE’s
21 testimony for substantial evidence where the VE concluded, without any
22 explanation or analysis, that a job that as-performed fell in between two
23 exertional ranges should be classified in one rather than the other exertional
24 range. The ALJ therefore erred by relying on the VE’s conclusion that
25 Castillo’s past relevant work as a “general clerk” (or secretary) was sedentary.

26
27 ⁵ The record shows that this conclusion referred to the “secretary”
28 position she held from December 2009 to May 2010. *See* AR 55-56, 90-91.

1 Taken together, the ALJ's failure to resolve the ambiguity surrounding
 2 Castillo's work as a receptionist and the erroneous reliance of the VE's
 3 unexplained conclusion that Castillo's past relevant work as a secretary was
 4 sedentary notwithstanding her contrary testimony are not harmless. If a
 5 claimant can perform her past relevant work as actually performed or as
 6 generally performed, the Commissioner will find that she is not disabled. See
 7 Pinto, 249 F.3d at 845; see also 20 C.F.R. §§ 404.1520(f), 404.1560(b)(3),
 8 416.920(f), 416.960(b)(3). Here, there was no error-free finding based on
 9 substantial evidence that Castillo could perform her past relevant work, either
 10 as actually or as generally performed. Because it is not clear from the record
 11 whether Castillo would be entitled to benefits at step four or step five, the
 12 appropriate remedy is to remand for further fact-finding at step four and, if
 13 appropriate, step five. See Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir.
 14 1987) ("The decision whether to remand a case for additional evidence, or
 15 simply to award benefits is within the discretion of the court.").

16 **E. Issue Five: Credibility Determination**

17 Castillo argues that the ALJ did not provide clear and convincing
 18 reasons for rejecting her testimony as not credible. JS at 42-45.

19 To determine whether a claimant's testimony about subjective pain or
 20 symptoms is credible, an ALJ must engage in a two-step analysis. Vasquez v.
 21 Astrue, 572 F.3d 586, 591 (9th Cir. 2009). First, the ALJ must determine
 22 whether the claimant has presented objective medical evidence of an
 23 underlying impairment that could reasonably be expected to produce the
 24 alleged pain or other symptoms. Lingenfelter, 504 F.3d at 1036. "[O]nce the
 25 claimant produces objective medical evidence of an underlying impairment, an
 26 adjudicator may not reject a claimant's subjective complaints based solely on a
 27 lack of objective medical evidence to fully corroborate the alleged severity of
 28 pain." Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991) (en banc) (citing

1 Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir.1986)). To the extent that an
2 individual's claims of functional limitations and restrictions due to alleged pain
3 are reasonably consistent with the objective medical evidence and other
4 evidence, the claimant's allegations will be credited. SSR 96-7p, 1996 WL
5 374186 (July 2, 1996) (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)).

6 If the claimant meets the first step and there is no affirmative evidence of
7 malingering, the ALJ must provide specific, clear, and convincing reasons for
8 discrediting a claimant's complaints. Robbins, 466 F.3d at 883. The ALJ must
9 consider a claimant's work record, observations of medical providers and third
10 parties with knowledge of claimant's limitations, aggravating factors,
11 functional restrictions caused by symptoms, effects of medication, and the
12 claimant's daily activities. Smolen v. Chater, 80 F.3d 1273, 1283-84 n.8 (9th
13 Cir. 1996)). The ALJ may also consider an unexplained failure to seek
14 treatment or follow a prescribed course of treatment and employ other
15 ordinary techniques of credibility evaluation. Id.

16 Here, the ALJ properly engaged in the required two-step analysis. First,
17 he determined that Castillo had presented objective medical evidence of an
18 underlying impairment that could reasonably be expected to produce her
19 alleged symptoms. AR 52. He then concluded that her statements concerning
20 the intensity, persistence, and limiting effects of those symptoms were not
21 credible to the extent they were inconsistent with the ALJ's RFC finding. Id.
22 The ALJ gave numerous reasons for this conclusion. AR 52-55. Castillo
23 claimed at the hearing that she could not get out of bed 4 or 5 days a month.
24 AR 50, 77. She testified that she takes painkillers as often as necessary (which,
25 at the time of the hearing, was every couple of days). AR 51, 72. Castillo
26 claimed that she could only walk for 10 to 15 minutes before needing to lie
27 down. AR 50, 73. The ALJ noted inconsistencies in Castillo's testimony, such
28 as her trip to Texas, her intermittent use of pain medication, and her ability to

1 care for her own hygiene, prepare simple food, drive, go on short walks with
2 her granddaughter, attend church, watch television, and read. AR 50-51; see,
3 e.g., Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (holding that
4 ALJ may consider many factors in weighing a claimant's credibility, including
5 "ordinary techniques of credibility evaluation, such as . . . prior inconsistent
6 statements concerning the symptoms, and other testimony by the claimant that
7 appears less than candid").

8 The ALJ also noted that Castillo's allegedly disabling symptoms have
9 been generally controlled with medication and that more aggressive treatment
10 has not been necessary. AR 51. For example, between July 2011 (when she
11 was first diagnosed with lupus) and August 2012, Castillo's steroid prescription
12 was gradually reduced from 80 milligrams to 10 milligrams; she reported doing
13 "well overall" on the lower dosages and it was noted that her lupus remained
14 inactive and well-controlled. AR 52-53, 322-324, 586, 589-90. After an increase
15 in her pain, she reported doing very well with no pain in December 2012 after
16 being treated with additional pain medication and Ibuprofen. AR 53, 576, 579,
17 582. In early 2013, Castillo was treated with low dosages of pain medication
18 and steroids, which allowed her to begin work at the bakery in spring 2013.
19 AR 53, 570-71, 574, 587. A physical examination in August 2013 showed no
20 active inflammation or deformities, normal gait, and normal strength. AR 53,
21 653. When Castillo reported a flare-up of pain and swelling in October 2013,
22 she was taking only 2 milligrams of steroids; her dosage was increased to 20
23 milligrams and she reported that her pain and fatigue were alleviated. AR 53-
24 54, 569, 649. Records from January 2014 show that she reported body pain,
25 and, after diagnostic images were unremarkable, it was noted that her pain
26 could be related to pain hypersensitivity and she was prescribed medication for
27 nerve pain. AR 54, 657-58, 665, 725-26. A conservative treatment history is a
28 legitimate basis for an ALJ to discount a claimant's credibility. See

1 Tommasetti, 533 F.3d at 1039; see also Fair v. Bowen, 885 F.2d 597, 604 (9th
2 Cir. 1989) (finding that the claimant's allegations of persistent, severe pain and
3 discomfort were belied by "minimal conservative treatment").

4 Castillo argues that several of the ALJ's reasons for rejecting her
5 testimony were not clear and convincing. First, Castillo disputes that her
6 activities of daily living, including her attempt to return to work in 2013,
7 undermined her claim that she has disabling functions. JS at 44. The Court
8 disagrees. As the ALJ set out in his description of Castillo's testimony, Castillo
9 testified that she could care for her own personal hygiene, prepare simple food,
10 drive, go for short walks with her granddaughter, attend church at least once a
11 week, read, and watch television. AR 51. Castillo was also able to perform a
12 far-from-sedentary job in a bakery for four months in 2013, where she pushed
13 carts weighing over 50 pounds, removed racks, put products on tables, and
14 packaged, labelled, and put products on the store floor. AR 67-68. While this
15 was an unsuccessful work attempt, it indicates that for four months, Castillo
16 maintained a job that required far more effort than her testimony would
17 suggest she was capable of. Thus, the ALJ properly considered Castillo's
18 activities of daily living in assessing her credibility. While it is true that "[o]ne
19 does not need to be 'utterly incapacitated' in order to be disabled," Vertigan v.
20 Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (quoting Fair, 885 F.2d at 603), the
21 extent of Castillo's activities support the ALJ's finding that her reports of the
22 severity of her impairments were not fully credible. See Bray v. Comm'r of
23 Soc. Sec. Admin., 554 F.3d 1219, 1227 (9th Cir. 2009); Curry v. Sullivan, 925
24 F.2d 1127, 1130 (9th Cir. 1991) (finding that the claimant's ability to "take
25 care of her personal needs, prepare easy meals, do light housework, and shop
26 for some groceries[] . . . may be seen as inconsistent with the presence of a
27 condition which would preclude all work activity").

28 Second, Castillo disputes that she received "routine and conservative"

1 treatment for her impairments. JS at 44-45. The number of Castillo's hospital
2 and emergency room visits, considered in a vacuum, could constitute non-
3 conservative treatment. However, upon admittance to the hospital or
4 emergency room, Castillo was regularly "only prescribed medications and
5 discharged without further intervention" and the "ALJ [therefore] properly
6 considered this conservative treatment history in finding [her] not fully
7 credible." See Mulligan v. Colvin, No. 14-1023, 2015 WL 5687661, at *4 (E.D.
8 Cal. Sept. 25, 2015). Further, "it was proper for the ALJ to consider that
9 [Castillo's] excessive pain testimony was undermined by evidence that [her]
10 pain symptoms were well controlled with routine treatment including
11 medications." Id. at *5; Warre, 439 F.3d at 1006 ("Impairments that can be
12 controlled effectively with medication are not disabling for the purpose of
13 determining eligibility for [disability] benefits").

14 Third, Castillo disputes that her medications have been "generally
15 successful" in controlling her symptoms. JS at 44-45. As explained in Section
16 IV.A.2, supra and herein, substantial medical evidence supported this finding.

17 Last, Castillo argues that the ALJ's observation that her medical
18 condition should result in her having muscle atrophy was an unsupported
19 medical assertion that the ALJ was not qualified to make. JS at 45. However,
20 even assuming that the ALJ erred in relying upon this assertion, any error
21 would be harmless because the ALJ's other reasons were supported by
22 substantial evidence. See Carmickle, 533 F.3d at 1162-63 (including erroneous
23 reason among other reasons to discount claimant's credibility harmless error
24 where substantial evidence supports other reasons).

25 On appellate review, the Court does not reweigh the hearing evidence
26 regarding Castillo's credibility. Rather, this Court is limited to determining
27 whether the ALJ properly identified clear and convincing reasons for
28 discrediting her credibility, which the ALJ did in this case. See Smolen, 80

1 F.3d at 1283-84. It is the ALJ's responsibility to determine credibility and
2 resolve conflicts or ambiguities in the evidence. Magallanes v. Bowen, 881
3 F.2d 747, 750 (9th Cir. 1989). If the ALJ's findings are supported by
4 substantial evidence, as here, this Court may not engage in second-guessing.
5 See Thomas, 278 F.3d at 959; Fair, 885 F.2d at 604. Therefore, remand is not
6 warranted on this basis.

7 **F. Issue Six: Third-Party Written Testimony**

8 Castillo argues that the ALJ erroneously rejected the written testimony
9 of her sister regarding her symptoms and abilities. JS at 49-51, 52-53.

10 **1. Relevant Facts**

11 Castillo's sister, Vickie Cortez, lives with Castillo and submitted a
12 written statement dated October 11, 2012. AR 286-94. Cortez wrote that she
13 cooked, cleaned, and shopped for Castillo, and that Castillo was limited by
14 tiredness and left-side limitations. AR 286. Castillo could prepare simple food
15 although Cortez did a lot of the cooking. AR 288. Castillo did chores
16 "depending on how she feels." Id. Castillo was unable to drive, but reading
17 every day and attending church at least once a week was a "strong part" of her
18 life. AR 289-90. Castillo could not walk for more than 5 minutes without
19 resting and could only pay attention for 30 minutes at a time. AR 291. Castillo
20 sometimes could not lift a cup of coffee and became tired very easily. Id.

21 The ALJ considered Cortez's testimony but found it to be not credible to
22 the extent it was inconsistent with the RFC finding. AR 52. The ALJ
23 explained that by "virtue of the relationship as a sister of the claimant, the
24 witness cannot be considered a disinterested party." Id. The ALJ also
25 explained that, "[m]ost important," the "clinical or diagnostic medical
26 evidence that is discussed more thoroughly below does not support her
27 statements." Id.

28 ///

1 **2. Analysis**

2 An ALJ must consider all of the available evidence in the individual's
3 case record, including written statements from caregivers and siblings. SSR 06-
4 03p, 2006 WL 2329939 (Aug. 9, 2006); Stout v. Comm'r, Soc. Sec. Admin.,
5 454 F.3d 1050, 1052-54 (9th Cir. 2006). The ALJ may discount that testimony,
6 however, by providing "reasons that are germane to each witness." Dodrill v.
7 Shalala, 12 F.3d 915, 919 (9th Cir. 1993). While an ALJ may not dismiss
8 "wholesale" testimony from "family witnesses" simply by virtue of their
9 membership in a group, considering a witness's close relationship with the
10 claimant is an appropriate reason for discounting testimony. See Smolen, 80
11 F.3d at 1289; Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006).

12 Here, the ALJ considered Cortez's statement and provided germane
13 reasons for discounting that testimony. The ALJ discounted Cortez's
14 statement not only because of her close relationship to Castillo, but also due to
15 the fact that the medical evidence did not support her statements. AR 52;
16 Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005) (noting that
17 inconsistency with medical evidence is germane reason for discounting lay
18 witness testimony). Castillo's pain was almost entirely resolved by 20
19 milligrams of prednisone, and her fatigue had greatly improved as of late
20 October 2013. This occurred a year after Cortez's statement and two months
21 after Castillo's primary care physician felt that Castillo could perform all daily
22 activities and return to work with pain control and counseling. AR 708.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

V.

CONCLUSION

While most of Castillo's arguments lack merit, her arguments regarding step four with respect to her past relevant work warrant remand for further fact-finding and analysis. Accordingly, the decision of the Social Security Commissioner is REVERSED and the action is REMANDED for further proceedings consistent with this opinion.

Dated: September 19, 2016

A handwritten signature in black ink, appearing to read 'Douglas F. McCormick', written over a horizontal line.

DOUGLAS F. McCORMICK
United States Magistrate Judge